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September 23, 2004

Elizabeth O' Donnell  
Executive Director  
Kentucky Public Service Commission  
211 Sower Boulevard  
P.O. Box 615  
Frankfort, Kentucky 40601

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**Re: Case No. 2004-00259 – Follow Up to Questions during Oral Argument**

Dear Ms. O'Donnell:

On September 14, 2004, counsel for the parties appeared to present oral argument to the Commission concerning BellSouth's legal obligation to provide line sharing. During the two-hour oral argument session there were several factual questions about Covad directed to undersigned local counsel. In addition there were questions concerning the Commission's December 15, 2003 order in Case No. 2001-00105. This letter responds to those questions.

Ms. Dougherty asked about how integral line sharing is to Covad's operations in Kentucky and asked specifically what percentage of Covad's Kentucky customers are served through line sharing arrangements. As of September 20, 2004 Covad had 1,623 customers in Kentucky. Of those, 1,038 are served via line sharing. Covad has over 200 customers in Zone 2 locations.

As a follow up to Ms. Dougherty's questions, Mr. Bentley asked about Covad's market share and whether a legal ruling in favor of Covad would be consistent with the "stated intent to stimulate investment in broadband and DSL" of the recently enacted changes to Chapter 278.

Covad believes the narrow legal question currently before the Commission does not directly implicate the recent statutory changes. This is because Covad is asking the Commission to find that line sharing is required under *federal law*. However, if line sharing becomes unavailable in Kentucky there will likely be situations where the only DSL-capable loop available at a specific customer location is the same loop being currently used by BellSouth to provide voice services. In such a situation, a potential Covad customer would have to discontinue BellSouth voice service in order to obtain broadband service from Covad. A

customer facing this choice is not likely to choose Covad. The far more likely result is that the customer will view BellSouth as the only choice for DSL-based services. This result does not appear consistent with a goal to promote competition in broadband. Moreover, since line sharing is only implemented on copper loops, nothing about line sharing hinders BellSouth's incentives to continue to invest in and employ advanced, fiber-optic-based loop facilities. Thus, while elimination of line sharing could reduce Covad's already small market share it would not promote additional investment in Kentucky. Conversely, continued availability of line sharing enables Covad to reach more potential customers and provides incentives for continued investment.

Chairman Goss asked what facilities Covad has in Kentucky. Covad has facilities collocated in 15 central offices serving Louisville. The facilities consist primarily of digital subscriber line access multiplexers or "DSLAMS." Through these collocated facilities, Covad has potential access to over 200,000 Kentucky customers. Covad has added two new central office collocations this year. Overall, Covad has invested over one million dollars in facilities in Kentucky.

Finally, Ms. Dougherty asked whether the Commission's December 15, 2003 Order in Case No. 2001-00105 affects the legal question currently before the Commission. Covad has reviewed the Order and believes it is not dispositive of the legal issue briefed in the instant case.

In Case No. 2001-00105, BellSouth asked to be excused from paying SEEM penalties associated with line sharing, asserting that under the FCC's Triennial Review Order ("TRO") line sharing was no longer required under *Section 251* of the Communications Act. In its December order, the Commission denied BellSouth's request to escrow the penalty payments. In denying BellSouth's request, the Commission stated the rationale for creating the SEEM performance measures and penalties had not been altered by the TRO. *Order at 2*. Of course, the SEEM plan related directly to *Section 271* obligations. Thus, nothing about the December order contradicts Covad's legal argument in the current arbitration case that BellSouth still has an obligation to provide line sharing.

Of course, the December order was preliminary in nature. The Commission later denied BellSouth's motion to modify the SEEM Plan to eliminate penalties associated with line sharing. In its May 11, 2004 order, the Commission stated that "consistent with its prior Order" it would deny the motion because "BellSouth remains obligated to provide line sharing during the transition period and, therefore, performance monitoring and compliance should continue until line sharing is fully eliminated pursuant to FCC orders." This sentence, which was not central to the Commission's holding, appears to be ambiguous.

Covad believes the cited language from the May order is not inconsistent with Covad's position today. As discussed in our brief and during oral argument, BellSouth has filed a petition at the FCC under 47 U.S.C. § 160, asking that the FCC forbear from enforcing 271

obligations for network elements no longer required to be unbundled under Section 251. This petition was already on file when the Kentucky Commission issued its May 11 order. Assuming Covad is correct that line sharing is currently required of BellSouth under item four of the competitive checklist, it is still possible the FCC may grant BellSouth's pending forbearance petition in the future, thus eliminating BellSouth's line sharing obligation "pursuant to FCC orders." On the other hand, BellSouth would likely argue this sentence was an acknowledgement by the Commission that the line sharing transition plan applies with equal force to all ILECs, including BOCs. Covad disagrees. If that is what the Commission had meant, it would have chosen much more specific language. A fair reading of the Commission's orders in Case No. 2001-00105<sup>1</sup> makes clear that the Commission has long emphasized its interest in monitoring BellSouth to ensure that it provides access to the necessary network components for the provisioning of advanced services. Covad believes the Commission would not change course without making its intentions clear. But since BellSouth's unsuccessful SEEM motion was based on Section 251, not Section 271, Covad believes the Section 271 question currently before the Commission was never directly addressed in Case No. 2001-00105. Accordingly, Covad thanks the Commission for permitting briefing on this question of law as part of the pending arbitration case.

Please indicate receipt of this letter by placing your file-stamp on the extra copy and returning to me in the enclosed, self-addressed, stamped envelope.

Sincerely yours,



Douglas F. Brent

Cc: Dorothy Chambers (via email)  
Amy E. Dougherty (via email)  
Chairman Mark David Goss  
Vice Chairman Ellen C. Williams

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<sup>1</sup> E.g., April 26, 2002 Order at 13-15 (discussing the need to give CLECs the unique capability of leveraging the existing infrastructure while promoting innovative service solutions for small and large customers).



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